

FCC MAIL SECTION

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 Before the  
 Federal Communications Commission  
 Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the Subscriber Carrier	)	
Selection Changes Provisions of the	)	CC Docket No. 94-129
Telecommunications Act of 1996	)	
	)	
Policies and Rules Concerning	)	
Unauthorized Changes of Consumers'	)	
Long Distance Carriers*	)	

### FIFTH ORDER ON RECONSIDERATION

Adopted: September 3, 2004

Released: November 24, 2004

By the Commission: Commissioners Copps and Adelstein issuing a joint statement; Commissioner Martin issuing a statement.

#### I. INTRODUCTION AND BACKGROUND

1. In this Fifth Order on Reconsideration (*Reconsideration Order*), we address issues raised in petitions for reconsideration of the Third Order on Reconsideration (*Third Reconsideration Order*) in this docket.<sup>1</sup> The *Third Reconsideration Order* amended our rules implementing section 258 of the

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\* Petitions for waiver were also filed in this proceeding by Great Plains Communications, Inc., The Nebraska Central Telephone Co., and TDS Telecommunications Corp (TDS Telecom), and a Joint Petition for Waiver was filed by the Northeast Nebraska Telephone Co. and NebCom, Inc. (all filed in CC Docket No. 94-129). Subsequently, the Nebraska LECs' counsel submitted comments in this docket on behalf of an additional 40 LECs, supporting the Nebraska LECs' contentions and purporting to join the Nebraska LECs' request for waiver. See Comments of Alpine Communications LC, Arlington Telephone Company, Big Sandy Telecom, Inc., Bluestem Telephone Company, C-R Telephone Company, Chautauqua and Erie Telephone Corporation, China Telephone Company, Chouteau Telephone Company, Clarks Telecommunications Co., Columbine Telephone Company, Community Service Telephone Company, Consolidated Telco Inc., Consolidated Telephone Company, Consolidated Telecom, Inc., Eastern Nebraska Telephone Company, Ellensburg Telephone Company, Inc., Franklin Telephone Co., Inc., Fremont TelCom, Gearheart Communications Inc., d/b/a Coalfields Telephone Company, GTC, Inc., Lexcom Telephone Company, Maine Telephone Company, Marianna and Scenery Hill Telephone Company, Northland Telephone Company of Maine, Inc., Odin Telephone Exchange, Inc., Peoples Mutual Telephone Company, Rock County Telephone Company, Sidney Telephone Company, Standish Telephone Company, Inc., STE/NE Acquisition Corp., d/b/a Northland Telephone Company of Vermont, Sunflower Telephone Co., Inc., Taconic Telephone Corp., The Blair Telephone Company, The El Paso Telephone Company, The Columbus Grove Telephone Company, The Hamilton Telephone Company, The Orwell Telephone Company, Waitsfield-Fayston Telephone Company, Western Iowa Telephone Association, Yates City Telephone Company, YCOM Networks, Inc. (filed January 2, 2004). See Appendix.

(continued....)

Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996 (1996 Act).<sup>2</sup> Section 258 prohibits any telecommunications carrier from submitting or executing an unauthorized change in a subscriber's selection of a provider of telephone exchange service or telephone toll service.<sup>3</sup> This practice, known as "slamming," distorts the telecommunications market by enabling companies that engage in fraudulent activity to increase their customer and revenue bases at the expense of consumers and law-abiding companies.

2. The Commission's rules implementing section 258 were promulgated through a series of orders.<sup>4</sup> In the *Second Report and Order*, the Commission sought to eliminate the profits associated with

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Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996 (1996 Act).<sup>2</sup> Section 258 prohibits any telecommunications carrier from submitting or executing an unauthorized change in a subscriber's selection of a provider of telephone exchange service or telephone toll service.<sup>3</sup> This practice, known as "slamming," distorts the telecommunications market by enabling companies that engage in fraudulent activity to increase their customer and revenue bases at the expense of consumers and law-abiding companies.

2. The Commission's rules implementing section 258 were promulgated through a series of orders.<sup>4</sup> In the *Second Report and Order*, the Commission sought to eliminate the profits associated with slamming by broadening the scope of its carrier change rules and adopting, among other things, more rigorous slamming liability and carrier change verification measures. When the Commission released the *Second Report and Order*, it recognized that additional revisions to the slamming rules could further improve the preferred carrier change process and prevent unauthorized changes. Therefore, concurrent with the release of the *Second Report and Order*, the Commission issued a Further Notice of Proposed Rulemaking (*Further Notice*).<sup>5</sup> In the *Third Report and Order*, the Commission adopted a number of rules proposed in the *Further Notice*, and addressed most issues raised on reconsideration of the *Second Report and Order*.<sup>6</sup> In addition, in the *First Reconsideration Order*, the Commission amended portions

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<sup>1</sup> *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Third Order on Reconsideration and Second Further Notice of Proposed Rule Making, 18 FCC Rcd 5099 (2003) (*Third Reconsideration Order*).

<sup>2</sup> 47 U.S.C. § 258(a).

<sup>3</sup> *Id.*

<sup>4</sup> *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508 (1998) (*Second Report and Order*), stayed in part, *MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. May 18, 1999) (*Stay Order*), motion to dissolve stay granted, *MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. June 27, 2000) (*Order Lifting Stay*). *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, First Order on Reconsideration, 15 FCC Rcd 8158 (2000) (*First Reconsideration Order*). *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996 (2000) (*Third Report and Order*); Errata, DA 00-2163 (rel. Sept. 25, 2000); Erratum, DA 00-292 (rel. Oct. 4, 2000). *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Order, 16 FCC Rcd 4999 (2001). 47 C.F.R. §§ 64.1100 *et seq.* Prior to the adoption of section 258 of the Act, the Commission had taken various steps to address the slamming problem; the adoption of section 258 expanded the Commission's authority in this area. See, e.g., *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Report and Order, 10 FCC Rcd 9560 (1995), stayed in part, 11 FCC Rcd 856 (1995); *Policies and Rules Concerning Changing Long Distance Carriers*, CC Docket No. 91-64, 7 FCC Rcd 1038 (1992), reconsideration denied, 8 FCC Rcd 3215 (1993); *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, 101 FCC 2d 935, reconsideration denied, 102 FCC 2d 503 (1985).

<sup>5</sup> *Second Report and Order*, 14 FCC Rcd at 1591-1609, ¶¶ 139-182.

<sup>6</sup> *Third Report and Order*, 15 FCC Rcd at 15999, ¶ 5.

of the rules regarding liability for slamming that had been stayed by the D.C. Circuit Court.<sup>7</sup> Finally, in the *Third Reconsideration Order*, we addressed remaining petitions for reconsideration of the previous orders, and modified certain rules concerning, amongst other things, verifications of carrier change requests and liability for slamming.<sup>8</sup>

3. In this *Reconsideration Order*, we address petitions filed by a coalition of independent local exchange carriers (LEC Petitioners) seeking reconsideration of the Commission's verification requirement for in-bound carrier change request calls.<sup>9</sup> Additionally, we address a petition filed by AT&T seeking clarification of the decision to apply our slamming rules to newly-installed lines.<sup>10</sup> Finally, we address a petition filed by WorldCom (MCI) seeking a finding that credits made to the consumer before a slamming complaint has been filed will be considered "unpaid" when calculating liability under the slamming rules, or will be deducted from the amount owed to the authorized carrier by a carrier found liable for a slam.<sup>11</sup>

## II. DISCUSSION

### A. In-bound Carrier Change Requests

4. Background. In the *Second Report and Order*, the Commission found that all changes to a subscriber's preferred carrier, including local exchange, intraLATA toll, and interLATA toll services, must be authorized by the subscriber and verified in accordance with the Commission's procedures.<sup>12</sup> In addition, the Commission found that its rules concerning customer verification of preferred carrier

<sup>7</sup> Shortly after the release of the *First Reconsideration Order*, the FCC filed a motion to dissolve the stay on the slamming liability rules that the D.C. Circuit had imposed in its *Stay Order*. Motion of the FCC to Dissolve the Stay, filed May 18, 2000 in *MCI WorldCom, Inc. v. FCC*, D.C. Cir. No. 99-1125. On June 27, 2000, the D.C. Circuit issued the *Order Lifting Stay*, which granted the Commission's unopposed motion and lifted the stay.

<sup>8</sup> See *Third Reconsideration Order*, 18 FCC Rcd at 5100-01, ¶¶ 3-4.

<sup>9</sup> See LEC Petitioners' Petition for Reconsideration, CC Docket No. 94-129, at 3-10 (filed May 19, 2003). AT&T and MCI also sought reconsideration of the in-bound verification requirement as it was articulated in the *Third Reconsideration Order*, but we addressed those concerns in a separate, clarifying order. See *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, 18 FCC Rcd 10997 (2003) (*Clarification Order*). In the *Clarification Order*, we clarified that in-bound carrier change requests must be verified in accordance with our verification rules only when the carrier change involves the LEC or an affiliate of the LEC: "In-bound customer requests to change long distance carriers, made directly to a LEC, remain exempted in cases where the LEC or its long distance affiliate is not the subject of the long distance carrier change." *Clarification Order*, 18 FCC Rcd at 10999, ¶ 5. Sprint and USTA also filed petitions for reconsideration, but withdrew them after the *Clarification Order* was released. See also *infra* notes 18 and 20.

<sup>10</sup> AT&T Petition for Reconsideration and for Clarification, CC Docket No. 94-129, at 6 (filed May 19, 2003) (AT&T Reconsideration Petition).

<sup>11</sup> WorldCom Petition for Reconsideration and Clarification, CC Docket No. 94-129, at 1 (filed May 19, 2003) (MCI Reconsideration Petition). WorldCom, Inc. has changed its corporate name to MCI, and we will generally refer to the company by its current corporate name.

<sup>12</sup> *Second Report & Order*, 14 FCC Rcd at 1566, ¶ 95.

change requests should apply to "in-bound" as well as "out-bound" calls, stating that "it serves the public interest to offer consumers who initiate calls to carriers the same protection under the verification rules as those consumers who are contacted by carriers."<sup>13</sup> While the *Second Report and Order* required all local exchange carriers (LECs) to verify changes between preferred LECs, the Commission carved a narrow exception to the verification requirement for LECs when interexchange carrier (IXC) change requests are made when consumers contact LECs directly to make the change. The Commission stated that, in these situations, the LEC is not providing IXC services to the subscriber, and would therefore have no incentive to slam. However, in the *Third Reconsideration Order*, the Commission found that, given the proliferation of consumers who are now or may soon be served by LECs that also provide interexchange services, it was necessary to require verification of long distance carrier change requests that occur when a customer initiates a call to a LEC, and the change request involves interexchange service provided by the LEC or its affiliate.<sup>14</sup> The subsequent *Clarification Order* clarified that such verification by a LEC is required only when the carrier change involves the LEC or an affiliate of the LEC.<sup>15</sup> The Commission found that such verification was necessary in order to deter slamming and as such furthered the goals of section 258.<sup>16</sup> In-bound customer requests to change long distance carriers, made directly to a LEC, remain exempted in cases where the LEC or its long distance affiliate is not the subject of the long distance carrier change.<sup>17</sup>

5. Petitions for Reconsideration. Several LECs seek reconsideration (or rescission) of the requirement, outlined in the *Reconsideration* and *Clarification Orders*, that all LECs obtain verification of long distance carrier changes in instances when a customer contacts a LEC directly to request the change, and seeks to change to the LEC's affiliated long distance provider.<sup>18</sup> The LEC Petitioners claim that the verification requirement imposes new costs on them and their customers, is not necessary to deter slamming or anticompetitive behavior with respect to their operations, and in fact has an anticompetitive effect on the LECs' businesses.<sup>19</sup> In addition, several of the LEC Petitioners, as well as TDS Telecom, filed petitions for permanent waivers of the verification requirement at issue in this petition for reconsideration, each raising essentially identical arguments for the respective LECs and their affiliated IXCs.<sup>20</sup>

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<sup>13</sup> *Id.* at 1549, ¶ 65.

<sup>14</sup> *Third Reconsideration Order*, 18 FCC Rcd at 5133-5134, ¶ 91.

<sup>15</sup> *Clarification Order*, 18 FCC Rcd at 10999, ¶ 5.

<sup>16</sup> *Third Reconsideration Order*, 18 FCC Rcd at 5133-5134, ¶ 91.

<sup>17</sup> *Id.*

<sup>18</sup> See LEC Petitioners' Petition for Reconsideration, CC Docket No. 94-129 (filed May 19, 2003 on behalf of 33 LECs; supplemented May 30, 2003). The LEC Petitioners are also parties to a motion for partial stay of the requirement at issue in this reconsideration petition. See LEC Petitioners Emergency Request for Partial Stay, CC Docket No. 94-129 (filed May 22, 2003 on behalf of the same 33 LECs; supplemented May 30, 2003). The arguments raised in the motion for stay are the same as those in the reconsideration petition.

<sup>19</sup> LEC Petitioners' Petition for Reconsideration at 3.

<sup>20</sup> The original waiver petitions were submitted on behalf of four Nebraska-based LECs (Nebraska LECs) that are among the 33 LECs signed onto the Petition for Reconsideration. See Great Plains Communications, Inc. Petition for Waiver, The Nebraska Central Telephone Co. Petition for Waiver, and Joint Petition for Waiver of the Northeast (continued....)

6. First, the LEC Petitioners contend that unaffiliated IXCs obtain a competitive advantage over LEC-affiliated interexchange carriers when the customer contacts the LEC directly, because the LEC is not required to verify customer requests to switch to an IXC in which it does not have a financial stake.<sup>21</sup> The LEC Petitioners claim they are disadvantaged by the rule due to their decision to use letters of agency (LOAs) to verify inbound carrier change requests rather than third-party verifications (TPVs). According to the LEC Petitioners, LOAs require at least a week's processing time before the requested changes can be effectuated.<sup>22</sup> The LEC Petitioners assert that small LECs may need to process hundreds or thousands of such LOAs per year, costing each LEC approximately \$122,000 annually.<sup>23</sup>

7. The LEC Petitioners further claim to have "spotless records" with respect to slamming complaints, stating that the Commission has not issued a single slamming order against any of the LEC Petitioners, and competing IXCs have not complained that the LEC Petitioners have acted anti-competitively. According to the LEC Petitioners, these records of good behavior can be used to predict that they will never slam their customers nor act anti-competitively in the future.<sup>24</sup>

8. Comments. AT&T contends that the LEC Petitioners' request undermines the purpose and effectiveness of the Commission's verification rules – *i.e.*, to ensure and provide increased protection to consumers who wish to authorize a carrier change request.<sup>25</sup> According to AT&T, the LEC Petitioners have offered no evidence that rural carriers are any less prone to the potential for bias and self-dealing than our rules are intended to prevent than larger carriers. AT&T maintains that the only way to safeguard all consumers is to subject all LECs to the Commission's verification rules and procedures.<sup>26</sup> Similarly, Verizon argues that these LEC Petitioners have presented no special circumstances warranting

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Nebraska Telephone Co. and NebCom, Inc. (all filed in CC Docket No. 94-129 on October 10, 2003). Subsequently, the Nebraska LECs' counsel submitted comments in this docket on behalf of an additional 40 LECs, supporting the Nebraska LECs' contentions and purporting to join the Nebraska LECs' request for waiver, or alternatively, seeking a grant of the LEC Petitioners' petition for reconsideration. See Comments of the Rural ILECs, CC Docket No. 94-129, filed January 2, 2004. Only 25 of these 40 additional LECs are also signed on to the LEC Petitioners' Petition for Reconsideration. *Id.* at Attachment A. The comments filed on January 2 also request waiver for 40 additional LECs, but contain no particularized factual information on any of these LECs in support of their request and do not attempt to show why these LECs face circumstances similar to those of the original four petitioners. Thus, even if we granted the waiver to the original four petitioners, we would still deny waiver to these additional 40 LECs. Finally, a petition for waiver was also filed by TDS Telecom on behalf of its LEC operating companies in CC Docket 94-129 on April 16, 2004, that raises essentially the same issues as the original four petitioners.

<sup>21</sup> LEC Petitioners' Petition for Reconsideration at 5-7.

<sup>22</sup> *Id.* at 4. See also Pennsylvania Telephone Association Comments; TDS Telecom Petition for Waiver at 4.

<sup>23</sup> LEC Petitioners' Supplement to Petition for Reconsideration at 4.

<sup>24</sup> See also TDS Petition for Waiver at 3. The LEC Petitioners argue that the Commission looks to past behavior to predict future actions in other contexts, such as Section 271 applications and broadcast and wireless license applications. See Great Plains Communications, Inc. Petition for Waiver at 8-9; Joint Petition for Waiver at 8-9; Nebraska Central Telephone Co. Petition for Waiver at 8-9. See also Pennsylvania Telephone Association Comments.

<sup>25</sup> AT&T Opposition at 4.

<sup>26</sup> *Id.* at 6.

any deviation from the general rule applicable to all LECs, and that if we were to relax this rule for LEC Petitioners, we should modify it or forbear from enforcing it as to all LECs.<sup>27</sup> MCI states that our verification requirements pose no undue burden on small LECs, and that the LEC Petitioners' claims concerning the competitive disadvantages that they assert arise from their use of LOAs are unwarranted because the Commission has provided all carriers with the same options for obtaining verification.<sup>28</sup>

9. Discussion. We deny the LEC Petitioners' multiple requests for reconsideration, waiver, and stay of our verification requirement for in-bound carrier change calls, as well as the waiver request of TDS Telecom.<sup>29</sup> The Commission has weighed the impact and cost of its verification requirements on carriers against the public interest benefits associated with the rules, and has found that verification is necessary when a carrier accepts a change request to its own service, regardless of how the request was received.<sup>30</sup> The LEC Petitioners ask that they, unlike all other carriers, be exempted from verifying carrier changes that benefit them financially. Under the original slamming rules, all LECs must verify a request to change a customer over to the LEC's own service.<sup>31</sup> With respect to IXC service, if a customer were to contact any IXC (LEC affiliated or not) directly to request long distance service, that IXC would have to obtain the required verification. In each of these situations, the carrier has a financial stake in completing the carrier change, and our verification requirements are thus necessary to deter slamming. Likewise, a LEC receives a direct benefit by signing up customers for its affiliated IXC. As AT&T notes, the simple fact that LEC Petitioners compete with other carriers for consumers' local and long

<sup>27</sup> Verizon Comments at 1.

<sup>28</sup> MCI Opposition at 6-7. See also AT&T Opposition at 4-5.

<sup>29</sup> Petitions for reconsideration are not granted for the purpose of altering our basic findings or debating matters that have been fully considered and substantively settled. Reconsideration based on new facts is appropriate only when these facts relate to events subsequent to the last opportunity for submission, were unknown and could not have been known by the petitioner at the time of the last opportunity, or the Commission determines that subsequent consideration is required to protect the public interest. *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band*, ET Docket No. 98-206, Fourth Memorandum Opinion and Order, 8 FCC Rcd 8428, 8450 at ¶ 49 (2003); *In the Matter of Regulatory Policy Regarding the Direct Broadcast Satellite Service*, General Docket No. 80-603, Memorandum Opinion Order, FCC 83-241, 94 FCC 2d 741, at ¶ 11 (1983). Waiver of the Commission's rules is appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest. See 47 C.F.R. § 1.3; *M&L Enterprises, Inc., D/B/A Skyline Telephone Company Petition for Waiver*, CC Docket No. 96-45, Order, FCC 04-86, 2004 WL 770186 (2004); *Northeast Cellular Telephone Co., LP v. FCC*, 897 F.2d 1164, 1166 (C.A.D.C. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). In order to justify a stay of our rules, a party must show that it is likely to prevail upon the merits; that it will suffer irreparable harm absent a stay; that interested parties will not be harmed if a stay is granted; and that the public interest favors grant of a stay. See 47 C.F.R. § 1.43; *Applications of Alvin Lou Media, Inc. and KM Communications, Inc. for New AM Broadcast Stations*, FCC 04-6, Memorandum Opinion & Order, 19 FCC Rcd. 806, 812 at n.44 (2004), citing *Virginia Petroleum Jobbers Ass'n. v. EPC*, 259 F.2d 921 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). The subject petitions do not meet the criteria for any of the methods of relief they seek; they merely seek to debate matters that have already been fully considered and substantively settled. Beyond their arguments that our verification requirements for in-bound carrier change calls should not apply to them, the LEC Petitioners present no facts or evidence demonstrating that they meet the standards for reconsideration, waiver, or stay of this rule. See notes 18-21, *supra*.

<sup>30</sup> *Second Report and Order*, 14 FCC Rcd at 1548-49, ¶¶ 63-65.

<sup>31</sup> 47 C.F.R. §§ 64.1100 *et seq.*

distance services is sufficient reason to subject them to the same verification rules as any other LEC that also provides interexchange services.<sup>32</sup> We believe that all customers, regardless of whether they receive service from larger, smaller, or rural LECs, should be given the same protections.

10. The LEC Petitioners' contentions regarding their disadvantaged position due to the fact that they believe that they would opt to use LOAs (as the verification method for changes to their IXC affiliates) are unavailing. The rules allow carriers to submit carrier change orders using both written and electronically-signed LOAs, in addition to third-party verifications that are made at the time of the customer call to the LEC. We emphasize that the use of LOAs is the *carrier's* decision, not the Commission's, and we have provided *all* carriers with the same options for obtaining verification.<sup>33</sup> Neither the purpose nor the effect of the requirement is to penalize carriers who choose one form of verification over another. The Commission has previously found that its rules "provide a carrier with sufficient flexibility to choose a verification method that is appropriate for that carrier."<sup>34</sup> The LEC Petitioners assert that they would be at a competitive disadvantage if they must provide for verification of changes to their IXC affiliate (when the customer calls the LEC directly to request the change) because LOAs take a week to process, whereas changes to non-affiliated IXCs would not have this LOA mailing delay. Notwithstanding the fact that the LEC could opt instead to use TPVs at the time of the initial customer call (as we discuss below), it is then unclear why, according to the Petitioning LECs' own arguments, the LEC affiliated IXCs currently use LOAs. It would seem that these affiliates would not opt to use LOAs if they believe, as the LEC Petitioners argue, that customers would prefer to use an IXC that, for example, utilizes immediate TPV at the time the customer contacts the LEC, rather than wait a week for a carrier change to an IXC that opts to utilize an LOA.

11. With respect to costs, the LEC Petitioners' burden estimate for the use of LOAs<sup>35</sup> appears to have been calculated (though it is somewhat unclear) by multiplying the total number of lines each of the companies serves and multiplying that figure by \$48.91, which is the amount per hour the Commission estimates it would take to *draft* a single LOA form – typically one to two pages long, at most – for a carrier to use for all future verifications.<sup>36</sup> Thus, the LEC Petitioners' burden estimates assume that *every year, all lines* will be switched to their IXC affiliates (and then away, so that they can be switched back the next year), and that petitioners will need to draft a new LOA form for every switch, instead of using the same form for all customers. In reality, the LEC Petitioners should already have an LOA form in place, since they appear to state that they utilize LOAs to switch customers to their LEC services. In addition, the LEC Petitioners' IXC affiliates should also have an LOA form in place (again assuming, as the LEC Petitioners appear to state, that the affiliates already use LOAs rather than TPVs) that is used to confirm switches for customers who contact the affiliate directly, just as every other IXC currently must do. A more accurate reflection of petitioners' annual costs to use LOAs would be the average number of switches per year that are made in the particular circumstances where a consumer

<sup>32</sup> AT&T Opposition at 4.

<sup>33</sup> 47 C.F.R. § 64.1120(c).

<sup>34</sup> *Second Report and Order*, 14 FCC Rcd at 1550, ¶ 67. See also AT&T Opposition at 4-5; MCI Opposition at 6-7.

<sup>35</sup> See LEC Petitioners' Supplement to Petition for Reconsideration at 4-5 and Attachment B at 12-15.

<sup>36</sup> For a more detailed estimate of costs associated with the slamming rules, see Paperwork Reduction Act Submission to the Office of Management and Budget, OMB Control No. 3060-787 (June 13, 2003).

contacts the Rural LEC directly and requests a switch to the LEC Petitioners' IXC affiliate. We have estimated that the annual cost per hour to process LOAs would be \$23.19.<sup>37</sup> It is reasonable to estimate that petitioners would require only a fraction of an hour to mail a single LOA form; and then to process it when it is received back from the consumer.<sup>38</sup>

12. We also find unpersuasive the LEC Petitioners' claim that they must use LOAs because the cost of using TPVs at the time of the customer call is cost prohibitive for small LECs.<sup>39</sup> The petitioners' own pleadings undermine this claim by acknowledging that they do not know the cost of using TPVs instead of LOAs, but simply assume, for reasons not explained in the petitions, that use of TPVs would be unduly expensive.<sup>40</sup> Specifically, the waiver petitions state that petitioners "do not foresee any benefit to using TPV, so [they have] not fully investigated [the cost of using TPVs]."<sup>41</sup> We have had extensive experience with companies that provide automated third party verification (for small and rural LECs and IXCs in particular) including VoiceLog, which provides TPV services to at least 200 carriers, most of which are small and/or rural carriers.<sup>42</sup> As acknowledged by the LEC waiver petitioners, when calculating overall TPV cost estimates for OMB purposes, we estimated that the average cost of a TPV is \$2.625.<sup>43</sup> While it is true that economies of scale may enable the largest carriers to pay less per TPV on average, the automated TPV service providers that are used by many smaller and rural carriers appear to charge on average approximately \$3.50-\$5.00 per TPV verification.<sup>44</sup> We note that this is far less than the \$12.50 per LOA verification that the LEC waiver petitioners claim that it would cost them to verify a carrier change using that method (and again, the LEC petitioners fail to explain why, if LOAs would be unduly expensive and time consuming for them, they would not then consider instead simply employing the less expensive and quick (generally at the same time as the customer call) automated TPV method favored by other smaller carriers). We see no reason why

<sup>37</sup> *Id.*

<sup>38</sup> In the petitions for waiver, the LEC Petitioners' estimate of cost per LOA is approximately \$12.50. TDS Telecom, in its Petition for Waiver, estimates the cost per LOA as \$1.00, and a TPV cost of approximately \$1.40-\$2.80 per verification depending on which verification company is used (see TDS Telecom Petition at 4).

<sup>39</sup> See Great Plains Communications, Inc. Petition for Waiver at 14-15; Joint Petition for Waiver at 14-15; Nebraska Central Telephone Co. Petition for Waiver at 14, quoting the Commission's Paperwork Reduction Act Submission to the Office of Management and Budget, OMB Control No. 3060-787 (June 13, 2003).

<sup>40</sup> *Id.*

<sup>41</sup> Great Plains Communications, Inc. Great Plains Communications, Inc. Petition for Waiver at 14-15; Joint Petition for Waiver at 14-15; Nebraska Central Telephone Co. Petition for Waiver at 14).

<sup>42</sup> See VoiceLog Petition for Partial Stay Pending Reconsideration in CC Docket No. 94-129, at 1 (filed March 28, 2001).

<sup>43</sup> See, e.g., Letter from John T. Nakahata, counsel for VoiceLog, to Marlene Dortch, Secretary, FCC, in CC Docket No. 94-129 (dated August 30, 2002), *Ex Parte* Presentation Attachment, at 2.

<sup>44</sup> For a detailed estimate of costs associated with the slamming rules, see Paperwork Reduction Act Submission to the Office of Management and Budget, OMB Control No. 3060-787 (June 13, 2003). Also, we note that TDS Telecom, in its Petition for Waiver, estimates a TPV cost of only approximately \$1.40-\$2.80 per verification depending on which verification company is used (see TDS Telecom Petition at 4).

petitioners here would be unable to avail themselves of the automated TPV verification option when this is the norm for a significant number of small and/or rural carriers.<sup>45</sup>

13. With regard to the claim that the LEC Petitioners have never been found to have slammed customers to their own IXC affiliates, we would expect that a customer who is billed by an unfamiliar IXC would ultimately lodge a complaint against *that* carrier, and not the LEC, even if that carrier is an affiliate of the LEC. Furthermore, even if the complaint were lodged against the LEC for the unauthorized long distance switch, until July 21, 2003, the Commission's rules did not hold LECs liable for slamming in cases when they executed unauthorized long distance carrier changes.<sup>46</sup> While the Commission has received many slamming complaints – usually lodged against an IXC – in which the LEC was ultimately found to have been responsible for the unauthorized IXC switch, the Commission in any event would not have been able to issue an order against the LEC before July 21, 2003. Thus, the claim that the Commission had not “issued a single slamming order”<sup>47</sup> against any of the LEC Petitioners for an unauthorized long distance affiliate carrier change is somewhat misleading, as both the petition for reconsideration and emergency motion for partial stay were filed prior to the effective date of the rules, while the petitions for waiver were filed just over two months after the rules took effect.

14. More importantly, however, we emphasize that *all* entities regulated by the Commission are required and expected to abide by our rules. The LEC Petitioners are therefore not entitled to special treatment simply because they claim they have done, and will continue to do what they are *obligated* to do under the Act: refrain from slamming and anticompetitive behavior.<sup>48</sup> As Verizon notes, our verification requirements are not imposed on individual carriers found guilty of slamming as a punishment for their infractions; the requirements are rules of general applicability for *all* carriers, whether or not they have a history of slamming.<sup>49</sup> Congress made a determination in section 258 that no “telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with verification procedures as the Commission shall prescribe.”<sup>50</sup> As the Commission has previously noted, LECs that compete with

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<sup>45</sup> We note that, in the *Third Reconsideration Order*, in response to filings received from smaller and rural carriers, automated TPV providers that generally serve smaller and rural carriers, and the Association of Communications Enterprises, the Commission modified its verification rules to enhance and facilitate the third party verification efforts of smaller and/or rural carriers in particular. We believe that the rule modification removed any significant impediments to the use of third party verifications, specifically with respect to small and/or rural carriers. See *Third Reconsideration Order* at 5110, ¶¶ 29-48.

<sup>46</sup> See *Public Notice*, Consumer & Governmental Affairs Bureau Announces Corrected Effective Date of Rules Adopted in Slamming Third Order On Reconsideration, CC Docket No. 94-129, 18 FCC Rcd 15320 (2003).

<sup>47</sup> See Great Plains Communications, Inc. Petition for Waiver at 6-9; Joint Petition for Waiver at 6-9; Nebraska Central Telephone Co. Petition for Waiver at 6-9.

<sup>48</sup> We also note that a finding that a slam has occurred is not dependent on intent; for example, it is not uncommon for carriers to make keying errors during the carrier change process. However, this does not mean that the customer should, at the discretion of the carrier, bear responsibility for the carrier's error. When asserting that they would never slam a customer, the LEC Petitioners appear to assume that they are incapable of making even an honest mistake.

<sup>49</sup> Verizon Comments at 2.

<sup>50</sup> 47 U.S.C. § 258(a).

other carriers for local and long distance services may not be neutral third parties in implementing carrier changes.<sup>51</sup> The Commission has implemented proactive slamming rules because its “experiences with slamming carriers demonstrate the vital importance of foreclosing potential sources of fraud before they become a major subject of consumer complaints.”<sup>52</sup>

#### B. Verifications for New Lines and New Installations

15. Background. In its petition for reconsideration of the *Second Report & Order*, AT&T asked the Commission to clarify, or in the alternative reconsider and hold, that the slamming rules apply to customers’ initial carrier selections for newly installed lines. AT&T asserted that, while nothing in the *Second Report & Order* suggested that such customers be excluded from slamming protections, the Commission should state more clearly that the slamming rules apply to a subscriber’s selection of preferred carriers, either as an initial carrier selection or as a change from an existing choice.<sup>53</sup> In the *Third Reconsideration Order*, we declined to extend application of section 258 to *initial* carrier selections, noting that section 258 expressly states that “[n]o telecommunications carrier shall submit or execute a change in subscriber’s selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe.”<sup>54</sup> We noted, however, that the statute encompasses *all* subscriber carrier change requests, and does not create exceptions for carrier changes that, for example, may coincide with a business relocation or expansion.<sup>55</sup>

16. Discussion. AT&T seeks reconsideration or clarification of our verification requirements with respect to residential customer moves or business customer relocations or expansions. It notes that, while the *Third Reconsideration Order* reaffirmed that carriers need not verify in-bound service requests for new lines, it also suggested that executing local carriers are obligated to perform verification in some new service installations<sup>56</sup> – i.e., where the change occurs at the same time a subscriber changes residences, or a business relocates or expands. AT&T contends that these statements are inconsistent. It claims that carriers are generally unable to determine whether a customer who requests a new number is either a “new” or “move” customer, and that under this reasoning a carrier “would be required to verify *all* in-bound service requests, even if the selections being verified are for a new line [in effect, creating] an exception that has eaten up the rule.”<sup>57</sup>

17. We disagree that the carrier change rules would be triggered by *all* in-bound service requests, as AT&T posits. While we emphasized in the *Third Order on Reconsideration* that the question of whether Section 258 verification requirements applied turned on whether there is, as the plain

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<sup>51</sup> *Third Reconsideration Order*, 18 FCC Rcd at 5133, ¶ 91.

<sup>52</sup> *Second Report and Order*, 14 FCC Rcd at 1549, ¶ 65.

<sup>53</sup> *Third Reconsideration Order*, 18 FCC Rcd at 5135, ¶ 96.

<sup>54</sup> *Id.* at 5137, ¶ 100.

<sup>55</sup> *Id.* at 5137-38, ¶ 101.

<sup>56</sup> AT&T Reconsideration Petition at 7.

<sup>57</sup> *Id.*

language of the statute states, a carrier “change,” and not whether there are new lines or new installations, we clarify here that we believe that the verification rules would presumably not be triggered where a customer calls merely to request additional service lines for the account, or is requesting a new service installation. Such situations would generally not involve a carrier “change,” since the customer would not have had a previous carrier on a newly installed line or for new service.<sup>58</sup> We re-emphasize that the statute is clearly intended to ensure that consumers receive service from the carrier of their choice without interference. As the Commission stated in the *Third Reconsideration Order*, Section 258 covers all *changes* to a subscriber’s selection of service providers, and we are bound by the statute’s requirements.

**C. Credited Charges Before a Complaint is Filed**

18. Background. In the *First Reconsideration Order*, the Commission concluded that once a carrier has been found liable for slamming, the unauthorized carrier is liable to the authorized carrier in an amount equal to 150% of the charges the consumer paid to the unauthorized carrier.<sup>59</sup> MCI subsequently sought clarification of this decision, seeking a finding that credits made to the consumer before a complaint has been filed would be considered “unpaid” when calculating liability under the slamming rules, or would be deducted from the amount owed to the authorized carrier by a carrier found guilty of a slam.<sup>60</sup> We declined to do so in the *Third Reconsideration Order*,<sup>61</sup> and MCI now seeks reconsideration of that decision.

19. Discussion. MCI’s petition essentially restates the same arguments we found unpersuasive in the *Third Order on Reconsideration*, and they are equally unavailing now. MCI argues that failure to offset reimbursed or credited charges from the amount the slammer is required to pay the authorized carrier can result in double payment, and will therefore reduce or override carriers’ incentives to satisfy a slammed customer.<sup>62</sup> However, as we previously stated, our experience with slamming complaints demonstrates that complaints are not often filed by consumers who were previously credited or reimbursed by the unauthorized carrier.<sup>63</sup> Both carriers and subscribers incur costs associated with remedying a slam, and we believe we are within our authority to award compensatory and consequential damages above the amounts collected in order to compensate for costs directly resulting from the slammer’s violation of the Act.<sup>64</sup> In any case, the fact that a carrier has chosen to attempt to appease a customer by reimbursing or crediting that customer for the unauthorized charges does not alter the

<sup>58</sup> We note that the Commission has recently observed cases in which a carrier has changed a customer’s service provider in an apparent slam, but the carrier claims that verification was not required because it changed the customer’s number – thus, the carrier claims that these instances involved “new service,” even though the customer neither moved nor had additional lines installed. We emphasize that verification should be obtained in these situations because a carrier change was executed.

<sup>59</sup> *First Reconsideration Order*, 15 FCC Rcd at 8166, ¶ 17.

<sup>60</sup> *Third Reconsideration Order*, 18 FCC Rcd at 5129-30, ¶ 80.

<sup>61</sup> *Id.* at 5130, ¶ 81.

<sup>62</sup> MCI Reconsideration Petition at 2-4.

<sup>63</sup> *Third Reconsideration Order*, 18 FCC Rcd at 5130, ¶ 81.

<sup>64</sup> *First Reconsideration Order*, 15 FCC Rcd at 8168, ¶ 20, n.49.

slammer's statutory liability to the *authorized* carrier that was deprived of monies due to the slam.<sup>65</sup> Our rules are intended to absolve subscribers of liability for slamming charges in order to ensure that carriers do not profit from slamming, as well as to compensate subscribers for the confusion and inconvenience they experience as a result of being slammed, and to ensure authorized carriers are not penalized as a result of the slam.<sup>66</sup>

### III. PROCEDURAL ISSUES

#### A. Regulatory Flexibility Act Analysis

20. In the *Reconsideration Order*, the Commission promulgates no additional final rules, and our present action is, therefore, not subject to the Regulatory Flexibility Act of 1980, as amended.<sup>67</sup>

#### B. Paperwork Reduction Act Analysis

21. This Order contains modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under § 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the modified information collections contained in this proceeding.

#### C. Materials in Accessible Formats

22. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at (202) 418-0531 (voice), (202) 418-7365 (TTY). This *Fourth Order on Reconsideration* can also be downloaded in Text and ASCII formats at: <http://www.fcc.gov/cgb/policy/>.

### IV. ORDERING CLAUSES

23. IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), 201, 206-208, and 258 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 206-208, and 258, and sections 1.421 and 1.429 of the Commission's rules, 47 C.F.R. §§ 1.421 and 1.429, that this Fifth Order on Reconsideration in CC Docket No. 94-129 IS ADOPTED.

24. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 154(j), and sections 1.3, 1.43, and 1.429 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.43, and 1.429, that the petitions for waiver, emergency partial stay, and reconsideration filed by the LEC Petitioners, LEC Commenters, TDS Telecom and the Nebraska LECs ARE DENIED.

<sup>65</sup> *Third Reconsideration Order*, 18 FCC Rcd at 5130, ¶ 81; 47 U.S.C. § 258.

<sup>66</sup> *See Second Report and Order*, 14 FCC Rcd 1512.

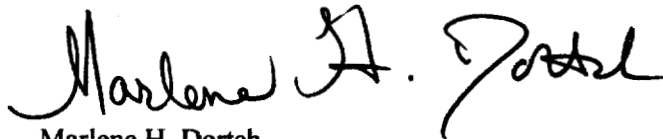
<sup>67</sup> *See* 5 U.S.C. § 604.

25. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 154(j), and section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, that AT&T's petition for reconsideration or clarification IS GRANTED to the extent indicated herein.

26. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 154(j), and section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, that MCI's petition for reconsideration IS DENIED.

27. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Fifth Order on Reconsideration to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Marlene H. Dortch", with a stylized flourish at the end.

Marlene H. Dortch,  
Secretary

**APPENDIX****Petitioners**

AT&T Corp.  
Great Plains Communications, Inc.  
Nebraska Central Telephone Co.  
Northeast Nebraska Telephone Co. and NebCom, Inc.  
TDS Telecommunications Corporation (TDS Telecom)  
WorldCom, Inc. (MCI)

**LEC Petitioners:**

Armour Independent Telephone Company  
Big Sandy Telecom, Inc.  
Bluestem Telephone Company  
Bridgewater-Canistota Telephone Company  
C-R Telephone Company  
Chouteau Telephone Company  
Columbine Telephone Company  
Consolidated Telco Inc.  
Ellensburg Telephone Company, Inc.  
Fretel Communications, LLC  
Great Plains Communications, Inc.  
GTC, Inc.  
Kadoka Telephone Company  
Maine Telephone Company  
Marianna and Scenery Hill Telephone Company  
Nebraska Central Telephone Company  
Northeast Nebraska Telephone Company  
Northland Telephone Company of Maine, Inc.  
Odin Telephone Exchange, Inc.  
Peoples Mutual Telephone Company  
Sidney Telephone Company  
Standish Telephone Company, Inc.  
STE/NE Acquisition Corp., d/b/a Northland Telephone Company of Vermont  
Sunflower Telephone Co., Inc.  
Taconic Telephone Corp.  
The El Paso Telephone Company  
The Columbus Grove Telephone Company  
The Orwell Telephone Company  
Union Telephone Company of Hartford  
Yates City Telephone Company  
YCOM Networks, Inc.

**Commenters**

AT&T Corp.  
Verizon Inc.

LEC Commenters:

Alpine Communications LC  
Arlington Telephone Company  
Big Sandy Telecom, Inc.  
Bluestem Telephone Company  
C-R Telephone Company  
Chautauqua and Erie Telephone Corporation  
China Telephone Company  
Chouteau Telephone Company  
Clarks Telecommunications Co.  
Columbine Telephone Company  
Community Service Telephone Company  
Consolidated Telco Inc.  
Consolidated Telephone Company  
Consolidated Telecom, Inc.  
Eastern Nebraska Telephone Company  
Ellensburg Telephone Company, Inc.  
Franklin Telephone Co., Inc.  
Fremont TelCom  
Gearheart Communications Inc., d/b/a Coalfields Telephone Company  
GTC, Inc.  
Lexcom Telephone Company  
Maine Telephone Company  
Marianna and Scenery Hill Telephone Company  
Northland Telephone Company of Maine, Inc.  
Odin Telephone Exchange, Inc.  
Peoples Mutual Telephone Company  
Pennsylvania Telephone Association  
Rock County Telephone Company  
Sidney Telephone Company  
Standish Telephone Company, Inc.  
STE/NE Acquisition Corp., d/b/a Northland Telephone Company of Vermont  
Sunflower Telephone Co., Inc.  
Taconic Telephone Corp.  
The Blair Telephone Company  
The El Paso Telephone Company  
The Columbus Grove Telephone Company  
The Hamilton Telephone Company  
The Orwell Telephone Company  
Waitsfield-Fayston Telephone Company  
Western Iowa Telephone Association  
Yates City Telephone Company  
YCOM Networks, Inc.

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN AND  
COMMISSIONER MICHAEL J. COPPS**

Re: *In the Matter of Implementation of the Subscriber Carrier Selection Changes  
Provisions of the Telecommunications Act of 1996, Policies and Rules  
Concerning Unauthorized Changes of Consumers' Long Distance Carriers  
(CC Docket No. 94-129)*

In the Telecommunications Act, Congress recognized the importance of protecting consumers from unscrupulous practices like slamming. Congress specifically charged the Commission with putting in place rules that prevent unauthorized carrier changes. We support today's decision because we believe it is consistent with the letter and spirit of this directive.

We nonetheless recognize that our slamming prevention rules, and in particular our third-party verification requirements, may pose a burden on smaller service providers. But evidence describing the extent of this burden was limited in the instant proceeding. Without a more substantial record, we cannot support granting the waiver of such an important consumer protection requirement. Still, we remain willing—and believe we have an obligation—to consider less costly ways for providers to comply with our slamming rules, provided they adequately protect consumers from unauthorized carrier changes.

**STATEMENT OF  
COMMISSIONER KEVIN J. MARTIN**

*Re: In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers; CC Docket No. 94-129*

I am concerned that today's decision regarding the Commission's slamming rules may unduly burden small and rural carriers. Under the Commission's slamming rules, all local exchange carriers are required to obtain verification—either by a third party or by a letter of authorization—of long distance carrier changes in instances when a customer contacts a LEC directly to request the change, and seeks to change to the LEC's affiliated long distance provider.

Several small and rural carriers maintain that they currently use letters of agency ("LOAs") to verify inbound carrier change requests rather than a third party verification process. Some rural carriers state that using a sophisticated third-party verification process for in-bound customer calls may increase costs and would place rural LECs that have an affiliated IXC that uses a manual LOA process at a competitive disadvantage vis-à-vis other larger carriers that use a third-party verification process.

While I am sympathetic to their concerns, it appears that the LEC petitioners in this proceeding have failed to supply demonstrable evidence on whether it is cost prohibitive for smaller and rural carriers to use the same third-party verification process used by larger carriers.